

Service Date: November 16, 2017

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Petition of)	REGULATORY DIVISION
NorthWestern Energy for a Declaratory)	
Ruling on the Availability of Schedule QF-1)	DOCKET NO. D2017.6.56
Rates to 71 Ranch, LP, Oversight Resources,)	ORDER 7574
LLC, and DA Wind Investors, LLC)	

ORDER DENYING PETITION FOR DECLARATORY RULING

PROCEDURAL HISTORY

1. On June 19, 2017, NorthWestern Energy (“NorthWestern”) filed a *Petition for Declaratory Ruling* (“Petition”) with the Montana Public Service Commission (“Commission”). NorthWestern requests a declaratory ruling regarding whether or not the three projects proposed by 71 Ranch, LP (“71 Ranch”); DA Wind Investors, LLC (“DAWI”); and Oversight Resources, LLC (“Oversight Resources”) (collectively, “Projects’ Owners”) are eligible for NorthWestern’s Electric Tariff Schedule QF-1 standard rates (“QF-1 rates”). Pet. for Declaratory Ruling 1 (June 19, 2017).

2. On July 6, 2017, the Commission issued a *Notice of Petition for Declaratory Ruling and Opportunity to Comment*, inviting interested persons an opportunity to submit data, views, requests for further process, or arguments (comments) related to the Petition no later than July 26, 2017, and allowing NorthWestern to respond to comments no later than August 11, 2017.

3. The Commission received timely comments from the Projects’ Owners, Projects’ Owners Comments (July 26, 2017) (“Comments”), and a brief Errata clarifying a referenced Federal Energy Regulatory Commission (“FERC”) decision, Projects’ Owners Errata (August 1, 2017).

4. NorthWestern filed a Response to the Comments on August 11, 2017 (“Response”).

DISCUSSION AND FINDINGS OF FACT

5. NorthWestern offers QF-1 rates to Qualifying Facilities (“QF”) with a nameplate capacity of three megawatts (“MW”) or less. Pet. at 2; see Order No. 7199d, Docket No. D2012.1.3 (Nov. 20, 2012).

6. On June 5, 2017, NorthWestern received a signed power purchase agreement (“PPA”) for each project: one for 71R Wind; one for DAW Wind; and one for OSR Wind (collectively, the “Projects”). Each project declared on its FERC Form 556 that it is a 3 MW, single turbine facility located near Gordon Butte in Meagher County, Montana. *Id.*

7. NorthWestern’s Petition asks the Commission to issue a declaratory ruling on whether the Projects are eligible for QF-1 rates as individual 3 MW facilities, or are in fact one aggregate facility and therefore ineligible for QF-1 rates. *Id.* at 1. NorthWestern attached a “Facilities Map” to its Petition that it asserts “clearly shows that the owners of the Projects strategically located the proposed projects within 1.01 miles of one another and 1.15 and 1.38 miles from the turbines in the existing Gordon Butte facility in order to satisfy the one-mile rule.” *Id.* at 3–4 (*see* Exhibit E). NorthWestern alleges that the Projects were separated and located more than a mile apart in order to qualify for QF-1 rates, and that the overlapping interests combined with the close proximity of all four projects demonstrate that the proposed Projects are “either one 9-MW project or simply an expansion of the existing Gordon Butte Facility,” and thereby disqualified for QF-1 rates because they exceed the 3 MW threshold. *Id.* at 6.

8. NorthWestern argues the Commission does not utilize FERC’s one-mile rule to determine whether or not projects qualify for QF-1 rates, rather the Commission uses the “totality of the circumstances” test, established in *Kenfield Wind*, and that “[t]he Commission considers factors such as the projects’ ownership, operations, interconnection and financing” when making a qualification determination, in order to determine whether a QF project is a single project or more than one project. Pet. at 3–4 (*see* Order 7068b, Docket. D2010.2.18, ¶ 14 (June 22, 2010)).

9. NorthWestern does not dispute that FERC uses its one-mile rule to determine whether a project qualifies as a QF. Resp. at 3.

10. NorthWestern argues the Projects are affiliated because Errol T. Galt and Sharrie K. Galt have ownership interests in Gordon Butte, 71R Wind, and OSR Wind facilities;

Richard Anderson has ownership interests in Gordon Butte and DAW Wind facilities; and Bryan Rogan has ownership interests in the Gordon Butte and OSR Wind facilities. NorthWestern alleges all of these operators and contact persons also own the Gordon Butte Facility; 71 Ranch owns the land for all four facilities; and the Projects use the same energy resource and intend to use the same interconnection point. Pet. at 2–3, 5 (*see* FERC Form 556 for each facility provided as Exhibits A through D on CD with the Petition).

11. The Projects' Owners argue that the Projects have been self-certified with FERC, the Projects are three separate QFs, and per Commission rules, QFs with nameplate capacity of 3 MW or less are eligible for standard avoided cost rates. Comments at 7. The Projects' Owners argue Commission rules establish a two-part inquiry to determine if QFs are eligible for QF-1 rates. First, each facility must be a QF, as determined by PURPA and FERC. *Id.* at 1–2, 4 (emphasis in original) (quoting *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub Utilities Comm'n*, 36 F.3d 848, 853-54 (9th Cir. 1994)); *see* 16 U.S.C. § 796(17)(C)). The second part of the inquiry directs that in order to be eligible for standard rates, the QFs must have a nameplate capacity of 3 MW or less. *Id.* at 12 (citing Mont. Admin. R. 38.5.1902(5); Docket No. D2012.1.3, Order No. 7199d (Nov. 20, 2012)).

12. The Projects' Owners argue that each QF has been self-certified as a QF with FERC and that NorthWestern concedes the Projects are three separate development-stage wind facilities, located more than one mile apart and designed to have a nameplate capacity of 3 MW each. Therefore, each project is eligible for QF-1 rates and NorthWestern's petition should be denied. *Id.* at 1–4 (citing Pet. at 3, Ex. E).

13. NorthWestern also alleges that each project may not be 3 MW in nameplate capacity since it has not been able to confirm the size of the turbine model, and the Gordon Butte facility was declared a 9.6 MW facility but “consistently produced greater than 10 MW and ultimately had to increase interconnection capacity.” Pet. at 6. The Projects' Owners assert that the Commission's requirement is “that a QF have a *nameplate* capacity of three megawatts or less to be eligible for standard avoided cost rates[,]” and each project meets that requirement on its FERC Form 556. Comments at 6–7; *see* Mont. Admin. R. 38.5.1902(5). The Projects' Owners argue that NorthWestern attempts to confuse the standard established in the rule by referencing the possibility of a QF's actual performance exceeding its nameplate capacity. *Id.* at 7.

14. The Projects' Owners allege that the "totality of the circumstances" test used in *Kenfield Wind* was "an attempt to interpret the one mile rule without clear guidance from FERC," and this argument was later rejected by FERC in 2012. *Id.* at 4–5 (citing *Northern Laramie Range Alliance*, 138 FERC ¶ 61,171 (2012), *aff'd*, 139 FERC ¶ 61,190 (2012)).

CONCLUSIONS OF LAW

15. The Commission "shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. . . . A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases." Mont. Code Ann. § 2-4-501 (2017).

16. The Commission adopted the Attorney General's Model Procedural Rules governing declaratory rulings. Admin. R. Mont. 38.2.101. "A party may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights." *Id.* at 1.3.226. However, in a declaratory judgment action generally:

The court is entitled in its discretion to refuse to rule on issues which are speculative, conjectural and academic, which are unnecessary to the resolution of an existing controversy or which merely seek legal advice on eventualities which may or may not arise in the future. The Uniform Declaratory Judgment Act is not a device to be used by litigants 'to fish in judicial ponds for legal advice.

City of Billings v. Pub. Serv. Comm'n, 193 Mont. 358, 366, 631 P.2d 1295, 1301 (1981) (internal citations omitted).

17. If an agency denies a petition for declaratory ruling, that agency must mail a copy of the order denying the petition to all persons named in the petition, and must include a statement of the grounds for denial. Admin. R. 1.3.228.

18. The Montana Supreme Court has spoken to when declaratory relief is appropriate:

The purpose of declaratory relief is to liquidate uncertainties and controversies which might result in future litigation and to adjudicate rights of parties who have not otherwise been given an opportunity to have those rights determined. However, it is not the true purpose of the declaratory judgment to provide a substitute for other regular actions.

In re Matter of Dewar, 169 Mont. 437, 444 (Apr. 6, 1976). “Declaratory relief is not meant to displace otherwise available remedies.” *In re License Revocation of Gildersleeve*, 283 Mont. 479, 484 (July 17, 1997).

19. FERC can, “on its own motion or on the motion of any person,” revoke the qualifying status of a self-certified QF if FERC finds the QF does not meet the applicable requirements for QFs. 18 C.F.R. 292.207(d)(iii).

20. In *Northern Laramie*, FERC clarified that the one-mile rule is a *standard*, not a *rebuttable presumption*, and the language of Order No. 688 only applies to the presumption that QFs 20 MW or smaller do not have nondiscriminatory transmission access, and thus does *not* support the argument that FERC should evaluate gaming “in the context of determining whether facilities satisfy the requirements for QF status in the first place.” *Northern Laramie I* at 61734 (emphasis added) (*see New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. P 31,233, at P 77 (2006), *order on hr’g*, Order No. 688-A, FERC Stats. & Regs. P 31,250 (2007), *aff’d sub nom. American Forest and Paper Association v. FERC*, 550 F.3d 1179 (D.C. Cir. 2008)).

21. In a 2017 Order granting applications for Beaver Creek Wind II, LLC, and Beaver Creek III, LLC, FERC rejected NorthWestern’s argument that FERC should decline to certify Beaver Creek II and Beaver Creek III as QFs. FERC reasoned that although the QFs were within one mile of at least two of the other facilities, they were unaffiliated with each other. In *Beaver Creek*, the applicants had a total of four projects before FERC for QF certification, and filed an application for certification of two facilities as QFs: Beaver Creek Wind II, LLC (Beaver Creek II), and Beaver Creek Wind III, LLC (Beaver Creek III). *Beaver Creek Wind II, LLC*, 160 F.E.R.C. P61,052, 61,262–61262 (F.E.R.C. Sept. 7, 2017). Beaver Creek Wind I, LLC (Beaver Creek I), and Beaver Creek IV, LLC (Beaver Creek IV) were self-certifications and the applicants noted that “while they are affiliated, their facilities are located more than one mile apart from each other,” therefore, they were not subject to the one-mile rule test. *Id.* at 61262 n.3.

22. Certain QFs may qualify for standard rates for purchases and the Commission rule regarding nameplate capacity qualification is clear. 18 C.F.R. § 292.304(c); Mont. Admin. R. 38.5.1902(5) (“Only qualifying facilities having a nameplate capacity not greater than 3 MW are eligible for standard offer rates.”). The Projects are separate 3 MW facilities, as currently certified by FERC. NorthWestern has

failed to show information otherwise and the Commission has not received evidence from FERC revoking the Projects' certification.

23. NorthWestern has the opportunity to remedy its concerns over the Projects' Owners QF sizes before FERC, just as NorthWestern did last year with the Beaver Creek projects. For the Commission to accept NorthWestern's petition and issue a declaratory ruling at this juncture would be to improperly provide a substitute for other regular actions available. Declaratory relief is not meant to displace otherwise available remedies and a declaratory ruling is unnecessary to the resolution of the existing controversy for the reasons discussed above. Finding that FERC already provides a remedy for resolution of this issue, particularly the ability to revoke a QF's status based upon misrepresentations in the facility's self-certification, the Commission finds that a declaratory ruling is not necessary and denies NorthWestern's petition.

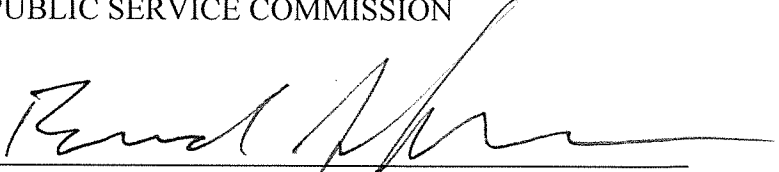
ORDER


IT IS HEREBY ORDERED THAT:


1. NorthWestern's *Petition for Declaratory Ruling* is DENIED.

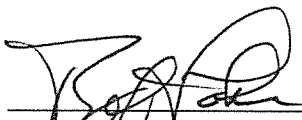
DONE AND DATED this 7th day of November, 2017, by a vote of 4 to 1.

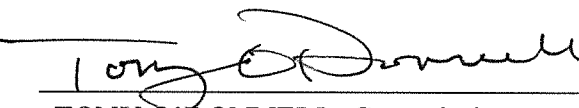
BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION


BRAD JOHNSON, Chairman


TRAVIS KAVULLA, Vice Chairman


ROGER KOOPMAN, Commissioner


BOB LAKE, Commissioner, Dissenting


TONY O'DONNELL, Commissioner

ATTEST:


Rhonda J. Simmons
Commission Secretary

(Seal)

